

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VERNON WAYNE MCNEAL,

Plaintiff,

v.

B. EVERT, et al.,

Defendants.

No. 2:22-cv-1360 AC P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. ECF No. 1. For the reasons stated below, the undersigned will recommend that plaintiff's application to proceed in forma pauperis, ECF No. 2, be denied and that plaintiff be given a final opportunity to pay the filing fee or suffer dismissal.

I. Three Strikes Analysis

The Prison Litigation Reform Act of 1995 (PLRA) permits any court of the United States to authorize the commencement and prosecution of any suit without prepayment of fees by a person who submits an affidavit indicating the inability to pay such fees. However,

[i]n no event shall a prisoner bring a civil action or appeal a judgement in a civil action or proceeding under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted,

1 unless the prisoner is under imminent danger of serious physical
2 injury.

3 28 U.S.C. § 1915(g). The plain language of the statute makes clear that a prisoner is precluded
4 from bringing a civil action or an appeal in forma pauperis if the prisoner has brought three
5 frivolous actions and/or appeals (or any combination thereof totaling three). Rodriguez v. Cook,
6 169 F.3d 1176, 1178 (9th Cir. 1999).

7 “[Section] 1915(g) should be used to deny a prisoner’s [in forma pauperis] status only
8 when, after careful evaluation of the order dismissing an action, and other relevant information,
9 the district court determines that the action was dismissed because it was frivolous, malicious or
10 failed to state a claim.” Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005). “[W]hen a
11 district court disposes of an in forma pauperis complaint ‘on the grounds that [the claim] is
12 frivolous, malicious, or fails to state a claim upon which relief may be granted,’ such a complaint
13 is ‘dismissed’ for purposes of § 1915(g) even if the district court styles such dismissal as denial of
14 the prisoner’s application to file the action without prepayment of the full filing fee.” O’Neal v.
15 Price, 531 F.3d 1146, 1153 (9th Cir. 2008) (second alteration in original). Dismissal also counts
16 as a strike under § 1915(g) “when (1) a district court dismisses a complaint on the ground that it
17 fails to state a claim, (2) the court grants leave to amend, and (3) the plaintiff then fails to file an
18 amended complaint” regardless of whether the case was dismissed with or without prejudice.
19 Harris v. Mangum, 863 F.3d 1133, 1142-43 (9th Cir. 2017).

20 Inspection of other cases filed by plaintiff has led to the identification of at least four cases
21 that qualify as strikes. The court takes judicial notice of the following lawsuits filed by plaintiff:¹

- 22 • McNeil v. Ervin, No. 2:07-cv-2240 LKK EFB (E.D. Cal. Mar. 3, 2010) (dismissed
23 for failure to state a claim after defendants filed motion to dismiss) (ECF Nos. 16,
24 30, 31);

25 ¹ The court “may take notice of proceedings in other courts, both within and without the federal
26 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex
27 rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)
28 (citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court
may take judicial notice of facts that are capable of accurate determination by sources whose
accuracy cannot reasonably be questioned).

- 1 • McNeal v. Dalu, No. 2:09-cv-1626 JAM KJM (E.D. Cal. June 29, 2010) (dismissed
- 2 for failure to state a claim) (ECF Nos. 25, 26);
- 3 • McNeal v. Gonzalez, No. 1:14-cv-0030 BAM (E.D. Cal. Mar. 18, 2015) (dismissed
- 4 for failure to state a claim) (ECF Nos. 20, 21); and
- 5 • McNeal v. Cano, No. 1:14-cv-1767 DLB (E.D. Cal. Aug. 18, 2015) (dismissed for
- 6 failure to follow court order and for failure to prosecute after initial dismissal with
- 7 leave to amend for failure to state a claim) (ECF Nos. 8 at 8; 9-11).²

8 Based on this history, plaintiff was declared to be a three-strikes litigant in McNeal v.
 9 Roberts, No. 2:18-cv-2998 KJM AC P. See McNeal v. Roberts, ECF Nos. 7, 11-13.

10 All of the preceding cases were dismissed well in advance of the [] filing of the instant
 11 action, and none of the strikes have been overturned. Therefore, the undersigned finds that
 12 plaintiff is precluded from proceeding in forma pauperis unless he is “under imminent danger of
 13 serious physical injury.” 28 U.S.C. § 1915(g). To satisfy the exception, plaintiff must have
 14 alleged facts that demonstrate that he was “under imminent danger of serious physical injury” at
 15 the time of filing the complaint. Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007)
 16 (“[I]t is the circumstances at the time of the filing of the complaint that matters for purposes of
 17 the ‘imminent danger’ exception to § 1915(g).”); see also, Abdul-Akbar v. McKelvie, 239 F.3d
 18 307, 312-14 (3rd Cir. 2001); Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999);
 19 Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998); Banos v. O’Guin, 144 F.3d 883, 885 (5th
 20 Cir. 1998).

21 The complaint before the court alleges a retaliatory cell search, two discrete instances of
 22 excessive force, and subsequent failure to treat injuries. All incidents are alleged to have
 23 occurred in 2004. See ECF No., *passim*. The incidents appear to have occurred at High Desert
 24 State Prison; plaintiff was at Centinella State Prison when the complaint was filed. See ECF No.

25
 26
 27 ² See Harris v. Mangum, 863 F.3d 1133, 1143 (9th Cir. 2017) (holding dismissal with leave to
 28 amend for failure to state claim followed by failure to amend constitutes strike under Section
 1915(g)). The style of the dismissal or of the procedural posture is immaterial. See El Shaddai v.
Zamora, 833 F.3d 1036, 1042 (9th Cir. 2016).

1 at 2-3 (identifying all 16 defendants as employees and officials of High Desert State Prison).³
The complaint describes no circumstances suggesting an imminent danger at the time the
complaint was filed, 18 years after the events recounted and when plaintiff was in a different
institution.

II. Plain Language Summary of this Order for a Pro Se Litigant

You have at least three strikes under § 1915(g) and cannot be granted in forma pauperis
status unless you show the court that you were in imminent danger of serious physical injury at
the time you filed the complaint. You have not shown that you were in imminent danger of
serious physical injury and so it is being recommended that your motion to proceed in forma
pauperis be denied and you be required to pay the whole filing fee at one time. If this
recommendation is adopted, failure to pay the fee will result in dismissal of the case.


CONCLUSION

Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court shall randomly
assign a United States District Judge to this action.

IT IS FURTHER RECOMMENDED that plaintiff be ordered to pay the entire \$402.00 in
required fees within thirty days or face dismissal of the case.

These findings and recommendations are submitted to the United States District Judge
assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
after being served with these findings and recommendations, plaintiff may file written objections
with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings
and Recommendations." Plaintiff is advised that failure to file objections within the specified
time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
(9th Cir. 1991).

DATED: September 26, 2022


ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE

³ Although the complaint alleges that plaintiff is an inmate at High Desert (ECF No. 1 at 2), both
the docket and the verification form attached to the complaint (id. at 18) indicate that he is housed
at Centinella and was when the complaint was filed.